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No. 82-1922

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.
and
NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC.
and
NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS, *Petitioners*,
v.
UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

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QUESTIONS PRESENTED

1. Whether a State's clearly articulated and affirmatively expressed policy to displace competition with a pervasive, actively supervised regulatory scheme, shields from antitrust liability a private party acting in a manner contemplated and authorized, but not literally compelled, by the State?

2. Whether the collective formulation and submission to a State regulatory board of a rate proposal by a group of motor common carriers, acting pursuant to a pervasive scheme of State regulation, is protected activity under the *Noerr-Pennington* doctrine?

PARTIES

The caption of this Brief contains the names of all parties to this action in the Fifth Circuit. One Defendant, Motor Carriers Traffic Association, Inc., did not appeal from the ruling of the district court. Neither Southern Motor Carriers Rate Conference, Inc., North Carolina Motor Carriers Association, Inc., nor the National Association of Regulatory Utility Commissioners has any parent, subsidiary or affiliated companies. A list of member carriers of Southern Motor Carriers Rate Conference is contained in the panel brief of Southern Motor Carriers Rate Conference filed in the Fifth Circuit, Unit "B."

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On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia is reported at 467 F. Supp. 471 (N.D. Ga. 1979). Appendix to Petition for Certiorari ("Pet. App.") A at 1a-30a. The opinion of the Fifth Circuit, Unit "B" is reported at 672 F.2d 469 (5th Cir. Unit "B" 1982). Pet. App. B at 31a-60a. The Fifth Circuit, Unit "B" entered an order granting rehearing *en banc*. Pet. App. C at 61a-62a. The opinion of the Fifth Circuit, Unit

"B" on rehearing is reported at 702 F.2d 532 (5th Cir. Unit "B" 1983). Pet. App. D at 63a-93a.

JURISDICTION

The judgment of the Fifth Circuit, Unit "B" was entered on April 5, 1982. A timely petition for rehearing and suggestion for rehearing *en banc* was granted by order on June 7, 1982. The *en banc* judgment of the Fifth Circuit, Unit "B" was entered on April 11, 1983. On April 21, 1983, Petitioners moved the Fifth Circuit, Unit "B" for a stay pending the filing of a petition for writ of certiorari. By order dated May 6, 1983, Pet. App. E at 94a-95a, that court granted the motion and stayed its mandate through May 30, 1983. The petition for certiorari was filed on May 27, 1983 and certiorari was granted on June 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966).

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C.A, § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The following statutes and regulations are set forth in Appendix A hereto: 28 U.S.C.A. § 10521(b); Section 62-130(a) and 62-152.1(b) and (h), North Carolina General Statutes; Section 46-7-18, Official Code of Georgia Annotated; Rule 1-3-1-.14, Georgia Public Service Commission; Sections 65-15-106(a) and 65-15-119, Tennessee Code Annotated; Rule 1220-2-1-.40, Tennessee Public Service Commission; Section 37-3-7, Code of Alabama; Section 37-3-19(g), Code of Alabama; Section 77-7-3, Mississippi Code Annotated; Section 77-7-221, Mississippi

Code Annotated; and Rule 39d(4), Mississippi Public Service Commission.

STATEMENT OF THE CASE

Petitioner Southern Motor Carriers Rate Conference, Inc. ("SMCRC") is an association of motor common carriers whose members provide interstate and intrastate transportation services. The interstate aspects of these services are regulated by the Interstate Commerce Commission; the intrastate aspects are subject to regulation by the States. Stipulation No. 3, Record ("R.") 1267-68. *See* 49 U.S.C.A. § 10521(b). SMCRC assists its members in proposing rates to the governing state regulatory agencies of Georgia, Mississippi, North Carolina and Tennessee,[1] and publishes interstate and intrastate tariffs containing rates for the transportation of general commodities between points in the southeastern United States, including the States of Georgia, Mississippi, North Carolina and Tennessee. Pet. App. at 2a.[2] Petitioner North Carolina Motor Carriers Association ("NCMCA") performs these functions on the intrastate level for its members in North Carolina. Petitioners SMCRC and NCMCA also represent their member carriers in rate hearings conducted by the state public service commissions having authority to regulate intrastate

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[1] See Affidavits, Exhibits "B", "C", "D" and "E" to SMCRC's Motion for Summary Judgment (R. 1341, 1372-88); Pet. App. at 1a-2a.

[2] SMCRC no longer publishes intrastate tariffs for carriers in Alabama and is not presently active before the Alabama Public Service Commission. Although the issue of Alabama's regulatory system accordingly may be moot as to SMCRC, it may not be moot as to Petitioner National Association of Regulatory Utility Commissioners, which was allowed to intervene by the District Court to represent the interests of the state regulatory bodies including, *inter alia*, the Alabama Public Service Commission. JA-44, 46.

motor carriers. *Id.* Petitioner National Association of Regulatory Utility Commissioners ("NARUC") is the national association for state regulatory commissioners, members of which regulate intrastate motor common carriers.

In 1976, Respondent United States filed a complaint alleging that SMCRC, NCMCA and Motor Carriers Traffic Association, Inc. ("MCTA") had been engaged since the early 1940's in a continuing conspiracy to fix intrastate general-commodity transportation rates within the states of Alabama, Georgia, Mississippi, North Carolina and Tennessee. Complaint ¶¶ 24-25, Joint Appendix ("JA")9-10.

At the district court's invitation *sua sponte*, R. 434-35, the attorneys general of these five States filed briefs as *amici curiae*, and NARUC was allowed to intervene as a defendant to represent the public service commissions of these five States. R. 466, 1260. While neither the States nor the state commissioners were named as defendants by the Government, the district court recognized that "[w]hether these five commissions will be able to continue in their present ratemaking routines is an essential question posed in this litigation." JA-46.

Intrastate motor transport is pervasively regulated in these States by state public service or public utility commissions acting under broad regulatory authority granted by state statutes. Pet. App. at 3a-7a. Indeed, these statutes place the power to prescribe motor common carrier rates in the state commissions.[3]

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[3] *Georgia*: *See* Official Code of Georgia Ann. § 46-7-18 (1984 Cum. Supp.), App. A at 4a, R. 437-38. and Pet. App. at 4a; *North Carolina*: *See* N.C. Gen. Stat. § 62-130(a) (1983 Supp.), App. A at 1a, Pet. App at 6a-7a, and R. 1088; *Tennessee*: *See* Tenn. Code Ann. § 65-15-106(a)

As noted by the district court, "[t]he states, as amici, have stressed the integral role of the conferences, and it is clear that, at the least, they are a part of daily regulatory life." Pet. App. at 9a. In general, see R. 1369-88, SMCRC maintains intrastate rate committees which meet to consider proposals by carriers submitted for publication as supplements to existing intrastate tariffs. After notice and opportunity to the public (including shippers) to express opinions, the committees either adopt the proposal as is, adopt it after making modifications, or reject it. Adopted proposals are published with various delayed effective dates and submitted to the respective state agencies for further action. The district court found that "[t]he commissions consistently require hearings, . . . and an order scheduling a hearing automatically suspends a proposed tariff." Pet. App. at 9a.

In light of these regulatory systems, representatives of the state commissions explicitly stated in the district court that collective rate proposals by regulated carriers are integral and necessary to their regulatory duties, and as such have been actively encouraged for decades.[4]

Intrastate motor carriers are not compelled to make collective rate proposals; instead, they may file proposals individually, which is called "independent action." Pet. App. at 93a. This is done for specific commodities and is

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(1983 Supp.), App. A at 8a, Pet. App. at 7a, R. 438; *Mississippi*: *See* Miss. Code Ann. § 77-7-221 (1972), App. A at 15a; *Alabama*: *See* Code of Alabama 1975 § 37-3-19(g)(1977), App. A at 14a.

[4] *See* Affidavit of Alabama Public Service Commissioners at ¶ 8 (R. 621, 622); Brief *Amicus Curiae* of State of Georgia (R. 684, 694); Response of State of Mississippi (R. 1056, 1065-66); Affidavit of I. H. Hinton, Director, Transportation Division, North Carolina Utilities Commission at ¶ 11 (JA-55, 60-61); Response of Tennessee Public Service Commission as *Amicus Curiae* (R. 901, 910-12).

an exception to the overall class rate structure within each state.[5]

Beyond the encouragement of the state commissions statutorily empowered to regulate, the activities of the rate conferences at issue herein have been contemplated and authorized by the legislatures of the affected States. North Carolina has by statute, N.C.Gen.Stat. § 62-152.1(b), App. A at 2a, authorized collective rate proposals by motor carriers and has immunized such conduct from state antitrust laws. Georgia has required its Public Service Commission to establish a collective ratemaking procedure for motor carriers and has required carriers to comply with such procedures. Official Code of Georgia Ann. § 46-7-18 (Cum. Supp. 1984), App. A at 4a. Georgia Public Service Commission Rule 1-3-1-.14, App. A at 6a, implements this statute with specific procedures. Tennessee, which previously authorized collective rate formulation by motor carriers pursuant to Rule 1220-2-1.40, Tennessee Public Service Commission, App. A at 11a, now also has enacted similar legislation. Tennessee Code Ann. § 65-15-119 (Supp. 1983), App. A at 9a. Mississippi and Alabama have enacted legislative systems pervasively regulating motor common carriers. The Mississippi and Alabama Public Service Commissions' administrative practices encourage and depend on rate bureau activities. *See* Affidavit of Alabama Public Service Comm'rs at ¶ 8, R. 621, 622; Response of State of Mississippi, R. 1056, 1065-66.

In the district court, Petitioners argued, *inter alia*, that their conduct did not violate the Sherman Act, since it was the state regulatory commissions which actually set the rates in response to proposals submitted by Petitioners. Petitioners also argued that their conduct was

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[5] *See* Affidavit of Andrew W. Rymer, at ¶ 11 (JA-79, 83).

immune from the federal antitrust laws by virtue of the state action doctrine and the *Noerr-Pennington* doctrine.

On cross-motions for summary judgment, the district court held that the state action doctrine did not apply because the involvement of the state regulatory commissions did not amount to state compulsion[6] and that *Noerr-Pennington* did not apply because the court believed it could "accord independent significance to the defendants' activities of rate formulation and proposal."[7] The court concluded that: "Even though the proposals require state sanction to take effect, the industry's participation in the process surpasses mere petitioning and renders the industry, in part, a decision-maker."[8] Finally, the district court found that the conduct constituted price fixing in violation of the Sherman Act notwithstanding the requirement that the proposed rates be submitted to the state regulatory commissions for review and possible modification or rejection.[9] Accordingly, the district court granted the Government's motion for summary judgment. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979). Pet. App. at 1a-30a.

On appeal, a divided panel of the Fifth Circuit, Unit "B" affirmed. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir., Unit B, 1982). Pet. App. at 31a-60a. Judge Johnson, joined by Judge Scott of the Middle District of Florida, sitting by designation, agreed with the district court that compulsion is a

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[6] Pet. App. at 21a-22a. The court held that compulsion was established as a prerequisite to state action in Goldfarb v. Virginia State Bar Association, 421 U.S. 773 (1975). Pet. App. at 18a.

[7] Pet. App. at 26a.

[8] *Id.*

[9] Pet. App. at 28a.

prerequisite to application of the state action doctrine. The majority interpreted this Court's decision in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) as relying upon a *Goldfarb*-based compulsion requirement.[10] Judge Hill dissented, finding that *Midcal* established a two-pronged test for state action which is applicable to the conduct of private parties, such as that of Petitioner SMCRC.[11]

As to *Noerr-Pennington*, the panel majority agreed with the district court that the initial step of collectively formulating a rate proposal could be viewed separately from the act of presenting the proposal to the state regulatory commissions. So viewed, the majority held that *Noerr-Pennington* did not protect the collective formulation of rates despite Respondent's implicit concession that the presenting of the proposed rates is protected activity.[12] Finally, the majority concluded that the activity at issue constituted price fixing in violation of the Sherman Act.[13]

On rehearing *en banc*, a divided Court of Appeals for the Fifth Circuit, Unit "B" affirmed, 8-4. *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. Unit "B" 1983). Pet. App. at 61a-93a. Judge Johnson, again writing for the majority, reiterated the view he expressed in the panel opinion that *Midcal* did not alter a *Goldfarb* compulsion requirement.[14] Judge Hill, again in dissent, expressly recognized the conflict between the holding of the majority and the "clear and

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[10] Pet. App. at 36a-39a.

[11] Pet. App. at 54a-55a (Hill, J., dissenting).

[12] Pet. App. at 43a-44a.

[13] Pet. App. at 46a-47a.

[14] Pet. App. at 73a-74a.

explicit" holding of this Court in *Midcal*.[15] Certiorari was granted by this Court on June 11, 1984. 52 U.S.L.W. 3885.

SUMMARY OF ARGUMENT

The state action doctrine first announced in *Parker* v. *Brown*, 317 U.S. 341 (1943) declares that the dictates of the Sherman Act do not proscribe anticompetitive activities of the States. The rationale of *Parker* is based on concepts of federalism inherent in our dual system of government. Beginning with *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) and continuing through *Hoover* v. *Ronwin*, 52 U.S.L.W. 4535 (U.S. April 15, 1984), this Court has refined the analysis utilized in cases involving the state action doctrine. As stated in *Hoover* last Term, it must first be determined whether the activity at issue is that of the State itself acting in a sovereign capacity. If so, the activity is, without more, beyond the reach of the antitrust laws. However, if the activity is that of a non-sovereign state representative, it must be determined whether such representative is acting pursuant to a clearly articulated and affirmatively expressed State policy and whether the State actively supervises the activities of its representative. *Id.* at 4538. See also *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

The Eleventh Circuit[16] incorrectly held that the two-part state action test announced in *Midcal* cannot be met

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[15] Pet. App. at 81a (Hill, J., dissenting).

[16] The panel and *en banc* decisions below were rendered by the Fifth Circuit, Unit "B," pursuant to Section 9(1) of Public Law 96-452 (October 14, 1980). In view of this Court's order granting certiorari to the Eleventh Circuit, all further references in this brief will so designate the court of appeals.

by private defendants unless the State literally compelled their activities. This holding failed to recognize the evolution of the state action doctrine through the later cases, including *Lafayette*, *Midcal* and *Hoover*.

The state statutes and regulations involved herein clearly articulate and affirmatively express state policies to displace competition in the area of motor common carrier rates. These statutes establish pervasive systems of regulation which contemplate and authorize collective rate formulation by motor common carriers. These rate proposals are submitted to state regulatory bodies which routinely suspend the filings and hold hearings to examine these proposals. Indeed, it is not disputed that the active supervision prong of the *Midcal* test is met in this case.

Each of the States involved herein, at the invitation of the district court, filed a brief *amicus curiae* and/or affidavits which indicated, *inter alia*, that the state public service commissions would have great difficulty fulfilling their regulatory mandates in the absence of collective rate formulation by the motor carriers. Thus, the activity of Petitioner SMCRC is a crucial and integral part of the state regulatory processes. Notwithstanding the absence of literal compulsion by the States to engage in collective rate formulation, the activities of the rate conferences are contemplated and authorized by the States and are subject to the active supervision of the States.

Finally, Petitioner SMCRC contends that its activities in formulating collective rate proposals and submitting those proposals to the state regulatory agencies constitute activities within the scope of the *Noerr-Pennington* doctrine and thus are exempt from the antitrust laws. *Noerr-Pennington* makes clear that collective activity comprised of petitioning the government is

shielded from the antitrust laws, even where the requested action would be anticompetitive. Moreover, the activity at issue herein serves the dual purposes of the *Noerr-Pennington* doctrine by providing the government with a valuable source of information through which the regulatory bodies discharge their responsibilities and allowing the private motor common carriers to petition their government with respect to activity that is of the utmost importance to them.

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ARGUMENT

I. The Evolution of the State Action Doctrine

A. Introduction—There Is a Binary Approach to Application of the State Action Doctrine

From the enunciation of the state action doctrine by Chief Justice Stone in *Parker* v. *Brown*, 317 U.S. 341 (1943), through this Court's most recent analysis of the doctrine in *Hoover* v. *Ronwin*, 52 U.S.L.W. 4535 (U.S. April 15, 1984), it has been unquestioned that the dictates of the Sherman Act do not proscribe anticompetitive activities of the several States. This is so because, in the now familiar words of Chief Justice Stone:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[17]

Since 1975, when this Court first revisited the state action doctrine in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the parameters of the doctrine have been evolving. As different courts applied their interpretations of the doctrine to different defendants engaged in various types of anticompetitive activities, it became nec-

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[17] 317 U.S. at 351.

essary for this Court to clarify state action. In so doing, the Court "has never departed, however, from *Parker's* basic reasoning."[18]

Thus it has been that the Court has applied *Parker* to evaluate situations involving the activities of state supreme courts,[19] municipalities,[20] a state administrative board[21] and private parties.[22] These cases, culminating with the decision in *Hoover* last Term, establish a binary approach to the application of the state action doctrine. First, if the activity is that of the state itself, *i.e.*, either the state legislature or state supreme court acting in a legislative capacity, the activity is, without more, beyond the reach of the antitrust laws.[23] Second, "[c]loser analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization."[24]

It is this second class of activity which is at issue *sub judice*.[25] Congress has reserved to the States the ex-

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[18] *Hoover*, 52 U.S.L.W. at 4538.

[19] *Hoover*, 52 U.S.L.W. 4535; Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

[20] Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

[21] New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978).

[22] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); *Goldfarb*, 421 U.S. 773.

[23] *Hoover*, 52 U.S.L.W. at 4538.

[24] *Id.* (footnote omitted).

[25] It is apparent that the activity is a part of regulatory systems displacing pure competition. Because of the regulatory context, once the lower courts found an absence of antitrust immunity (under *Parker* and *Noerr-Pennington*), their analysis of anticompetitive

clusive authority to regulate intrastate motor common carriers, specifically including the regulation and setting of intrastate rates.[26] The state legislatures of Alabama, Georgia, Mississippi, North Carolina, and Tennessee, pursuant to this reserved authority, have directed state public service commissions to regulate the activity of motor common carriers operating in intrastate commerce.[27] To the end of an efficient regulatory process, these legislatures have clearly articulated an intent to displace competition and have contemplated collective activity among motor carriers, subject to pervasive regulation, in order to achieve their regulatory goals.[28] It is Petitioner SMCRC's contention that these statutes, combined with the active supervision of the state public service commissions, constitute the basis for a valid state action defense. An examination of this Court's state action decisions, therefore, is necessary to determine whether the proper test was applied by the Eleventh Circuit in rejecting Petitioner SMCRC's state action defense.

B. Parker and Its Progeny Establish a Two-Part Test Which Should Be Applied to Petitioner's Activities

As noted above, it was first recognized in *Parker* that Congress had not intended, by enacting the antitrust laws, to proscribe the activities of the States as sovereign authorities. This limitation was then and is now grounded in notions of federalism. In *Parker*, the State Agricultural Prorate Advisory Act authorized but did not compel

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effects should have been under the Rule of Reason because of the demonstration in the record of the necessity of these activities to state regulation of motor carriers. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 23-24 (1979).

[26] 49 U.S.C. § 10521(b).

[27] See *supra* section II. A at p. 24.

[28] See *supra* section II. B at p. 30.

private raisin growers to jointly propose and petition the State Agricultural Prorate Advisory Commission to approve a marketing program for the raisin crop. The Court held that an approved program was immune from the antitrust laws, stating:

> It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the progam and which enforces it with penal sanctions, in the execution of a governmental policy.

317 U.S. at 352. *Parker* was the first and last word on state action immunity for more than thirty years.

In 1975, however, the Court handed down its decision in *Goldfarb*, which provides much of the grist for the dispute here. *Goldfarb* involved publication of a minimum fee schedule by the Fairfax County Bar Association. This fee schedule was condoned by the State Bar, which issued two ethical opinions to the effect that the schedules could not be habitually ignored by attorneys. 421 U.S. at 776-77. However, the Virginia Supreme Court had "explicitly directed lawyers not 'to be controlled' by fee schedules." *Id.* at 788-89. The Court held that there was no "state action" involved in the establishment of the minimum fee schedule:

> [I]t cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or re-

> quire the type of price floor which arose from respondents' activities.

421 U.S. at 790. The Court rejected an application of state action based on the contention that the Bar's activities complemented the state ethical code for attorneys, stating:

> It is not enough that as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 791. It is this language which is relied upon by the Eleventh Circuit *sub judice* as the basis for its holding that "compulsion is required of private parties. . . ." Pet. App. at 65a. In so holding, the Eleventh Circuit has failed to perceive that:

> Our conceptions of the limits imposed by federalism are bound to evolve, just as our understanding of Congress' power under the Commerce Clause has evolved. Consequently, since we find it appropriate to allow the ambit of the Sherman Act to expand with evolving perceptions of congressional power under the Commerce Clause, a similar process should occur with respect to "state action" analysis under Parker.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring in part and in the judgment).[29]

A clear standard for state action did not emerge from *Goldfarb*. In the next state action case, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), five members of the Court agreed only that state action immunity did not apply to a private utility company which supplied its

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[29] The notion of an evolving state action doctrine also is suggested by Judge Hill in his dissent to the *en banc* decision below. See Pet. App. at 84a-88a. *See also* Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 *Harv.L.Rev.* 435 (1981).

residential customers with free replacement light bulbs pursuant to tariffs approved by the Michigan Public Service Commission. The Justices agreed that mere approval of the tariff by the Public Service Commission did not convert the private action of the utility company into state action. 428 U.S. at 598. Four Justices were of the opinion that unless a public official or agency was named as a defendant or accused of violating the antitrust laws, the *Parker* rationale would not apply. 428 U.S. at 591-92.

Chief Justice Burger, who cast the fifth vote joining in the judgment of the Court, wrote separately to observe that:

> In interpreting Parker, the Court has heretofore focused on the challenged *activity*, not upon the identity of the *parties* to the suit.

428 U.S. at 604 (Burger, C.J., concurring in part and in the judgment).[30] The Chief Justice then pointed out that Michigan law was neutral on the question of a light bulb replacement program, which was not essential to the regulatory scheme, and that a state action exemption "on the basis of Michigan's undifferentiated sanction of this ancillary practice could serve no federal or state policy." *Id.* at 605.

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[30] An analysis which focuses on the party rather than the activity similarly was rejected in the dissent to *Cantor* written by Justice Stewart and joined in by Justices Powell and Rehnquist:

> If Parker v Brown, supra, could be circumvented by the simple expedient of suing the private party against whom the State's 'anticompetitive' command runs, then that holding would become an empty formalism, standing for little more than the proposition that Porter Brown sued the wrong parties.

428 U.S. at 617 n.4. *See also* Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F.Supp. 711, 724 (D. D.C. 1979) *aff'd per curiam*, No. 79-1658 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); Pet. App. at 83a-84a (Hill, J., dissenting).

With the next opportunity to review the state action doctrine in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), the Court began to identify the binary nature of the doctrine—that is, entitlement to state action depends on whether the activity is (1) that of the State itself, acting as sovereign through its legislature or supreme court, or (2) that of a representative of the State. *Bates* involved a challenge by two attorneys to State Bar of Arizona rules prohibiting lawyer advertising. The attorneys claimed, *inter alia*, that the rules violated the Sherman Act because they tended to limit competition.

The Court held that, despite the absence of the Arizona Supreme Court as a defendant, the attorneys were in fact challenging an act of the State:

> The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. . . . Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

433 U.S. at 361 (citation omitted).[31] Insofar as the private defendant State Bar was concerned, the Court noted that the disciplinary rules "reflect a clear articulation of the State's policy with regard to professional behavior." *Id.* at 362. "Moreover . . . the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Id.*

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[31] The majority opinion in *Bates* was written by Justice Blackmun and joined in by Justices Brennan, White, Marshall and Stevens. Chief Justice Burger, Justice Powell (joined by Justice Stewart) and Justice Rehnquist each wrote separate opinions in which, *inter alia*, they each concurred in the portion of the majority opinion relating to state action. Thus, at least as to state action, the *Bates* Court was unanimous.

Thus, although *Bates* is seen as a case in which the activity was that of the State itself acting legislatively through the Arizona Supreme Court,[32] the Court expressed the position that a clear and affirmative articulation of state policy, together with active state supervision, would insulate a state's representatives from antitrust liability. This position continued to develop in subsequent state action decisions involving various types of activities of non-sovereign state representatives, including *Lafayette* (a municipality), *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (new franchises controlled by a state administrative agency) and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (a private price-fixing arrangement).

In *Lafayette*, private utility companies filed an antitrust counterclaim against the City of Lafayette, which had instituted an antitrust action against the companies. Justice Brennan, delivering the opinion of the Court, held that Congress did not intend to exclude cities from the reach of the Sherman Act. 435 U.S. at 408. In an opinion joined by Justices Marshall, Powell and Stevens, Justice Brennan went on to state that although municipalities are not the equivalent of States for state action purposes, municipalities which engage in anticompetitive conduct "pursuant to state policy to displace competition with regulation or monopoly public service" are within the scope of the *Parker* doctrine. *Id.* at 413.

The plurality expressed the opinion that, "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.' " *Id.* at 415.

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[32] *Hoover*, 52 U.S.L.W. at 4538.

Justice Brennan explained that this test would require municipalities to comply with the antitrust laws unless the State has "directed or authorized an anticompetitive practice." *Id.* at 416. Chief Justice Burger, concurring in the judgment, saw the plurality's test as a minimum showing to be required by municipalities seeking state action protection. *Id.* at 425 n.6. In dissent, Justice Stewart, joined by Justices White, Rehnquist and, in pertinent part, Blackmun, would have held that the activities of municipalities are "governmental action" which are *ipso facto* immune from the antitrust laws under *Parker*. 435 U.S. at 429.

In *New Motor Vehicle Board*, six members of the Court held that a program requiring a state administrative board to review and approve the relocation or establishment of new-car dealerships was immune from antitrust attack despite the fact that approval would be delayed automatically upon the non-compelled filing of a protest by a private competitor of the applicant. "[T]he Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *New Motor Vehicle Board*, 439 U.S. at 109.

In comparison to *New Motor Vehicle Board*, in which a state administrative agency acted in response to private initiative, *Midcal* presented activity amounting to "essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106. In *Midcal*, a California statute required all wine producers, wholesalers and rectifiers to file fair trade contracts or price schedules with the State. Sales of wine at prices other than those established in the fair trade contracts or wholesaler price schedules were prohibited. The State retained no responsibility or authority to

review the contracts or schedules filed in compliance with the statute.

After reviewing the state action decisions from *Parker* through *New Motor Vehicle Board*, a unanimous[33] Court held that:

> These decisions establish two standards for antitrust immunity under Parker v Brown. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself.

445 U.S. at 105. Applying this test to the facts, the *Midcal* Court concluded the California statute constituted a clear state policy to displace competition, thus meeting the first prong of the test. *Id.* As to the active supervision requirement, the Court held:

> The program, however, does not meet the second requirement for Parker immunity. The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of the fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.

Id. at 105-06. Nothing in the subsequent decision in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982) disturbs the *Midcal* test. Indeed, the *Boulder* Court recognized that *Lafayette*, *New Motor Vehicle Board* and *Midcal* "reaffirmed both the vitality and intrinsic limits of the Parker state-action doctrine." 455 U.S. at 54. The *Boulder* Court observed:

> It was expressly recognized by the plurality opinion in City of Lafayette that municipalities "are not

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[33] Justice Brennan did not participate in the consideration or decision of *Midcal*.

> themselves sovereign," . . . and that accordingly they could partake of the Parker exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy . . . The Court adopted this view in [New Motor Vehicle Board v.] Orrin W. Fox Co. . . . and Midcal. . . .

Id. The Eleventh Circuit majority in the case *sub judice* was of the opinion that *Midcal* "had nothing to do with the applicability of a state action defense to a private party." Pet. App. at 74a. As support for this proposition, the Eleventh Circuit notes that immediately following the enunciation of the two-part test in *Midcal*, the Court cited *Lafayette*, a "non-private party case." Pet. App. at 75a. Additionally, the Eleventh Circuit claims support from the above-quoted statement in *Boulder*, 455 U.S. at 51 n.14, that *Midcal* "adopted the principle . . . that anticompetitive restraints *engaged in by state municipalities or subdivisions* must be 'clearly articulated and affirmatively expressed as state policy' in order to gain an antitrust exemption." Pet. App. at 75a (emphasis by the Eleventh Circuit). This reasoning ignores the fact that *New Motor Vehicle Board* adopted and applied the "clear articulation" test to a state administrative board while *Midcal* adopted and applied the test to a private price-fixing arrangement.[34]

Indeed, Petitioner SMCRC suggests that the citation to *Lafayette* following the announcement of the *Midcal* test, and the subsequent reference in *Boulder*, demonstrate that municipalities and private parties are intertwined for purposes of the initial analysis undertaken in state action cases. This approach is continued in *Boulder*,

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[34] 445 U.S. at 106. *See also Hoover* 52 U.S.L.W. at 4538; Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 824 n.9 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982); Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. at 724-725.

which applies the "clear articulation and affirmative expression" test to a municipality's home rule ordinance and concludes that a statute providing a general grant of legislative power is neutral as to anticompetitive activity. Therefore, the statute cannot be viewed as affirmatively expressing a state policy to displace the antitrust laws. 455 U.S. at 55-56.[35]

The state versus non-state binary structure for state action was reaffirmed just last Term in *Hoover*. There it was held that "when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." 52 U.S.L.W. at 4538. Similarly, "a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature." *Id.* But:

> Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization. See, *e.g.*, *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982) (municipal regulation of cable television industry); *California Liquor Dealers* v. *Midcal Aluminum*, 455 U.S. 97 (1980) (private price-fixing arrangement authorized by State); *New Motor Vehicle Board of California* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978) (new franchises controlled by state administrative board).

52 U.S.L.W. at 4538. The Eleventh Circuit's statment below that *Midcal* had nothing to do with private parties

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[35] It has been suggested that municipalities need not demonstrate active state supervision in order to qualify for state action immunity. Town of Hallie v. City of Eau Claire, 700 F.2d at 381-82. That the question has yet to be resolved by this Court was made clear in *Boulder*: "Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in Midcal." 455 U.S. 51 n.14

was made prior to the decision in *Hoover*, in which this Court characterized *Midcal* once again as involving private anticompetitive activity. *Hoover*, 52 U.S.L.W. at 4538; *Midcal*, 445 U.S. at 106.

Therefore, *Hoover* teaches that municipalities, private parties and state administrative agencies are "nonsovereign state representatives" of which "the Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation. . . . The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry." 52 U.S.L.W. at 4538.

The court of appeals held below that the absence of "compulsion" was fatal to the position of Petitioners, despite the presence of active supervision by the States, Pet. App. at 73a, and regardless of how clearly articulated the State policy may have been. Pet. App. at 64a-65a. That "compulsion" as utilized in *Goldfarb* and *Cantor*, and subsequently repeated occasionally in later decisions, did not mean literal compulsion as the *sine qua non* of state action,[36] and that it was not so interpreted by the courts, has been recognized by a leading commentator:

> In addition to requiring state supervision and intent to displace antitrust law, *Goldfarb* and *Cantor* emphasized that the state had not "compelled" the bar to fix prices or the utility to file a "free light bulb" tariff. Compulsion, however, should not be read as an independent requirement for state action immunity; rather, its presence or absence should serve only as strong evidence about state intent.

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[36] *Southern Motor Carriers*, Pet. App. at 54a-55a (Hill, J., dissenting).

Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv.L.Rev. 435, 438 (1981).[37] The Eleventh Circuit majority failed to perceive the development and evolution of the state action doctrine. Indeed, the majority stated that "as *Goldfarb* and *Parker* established, the compulsion inquiry is to determine whether the specific anti-competitive activity at issue was actually that of the state acting as sovereign." Pet. App. at 76a, 77a n.16. This statement misconceives the binary analysis made clear in *Hoover*. Rather than inquiring whether the State was acting as sovereign, the Eleventh Circuit should have applied *Midcal* and determined whether "the anti-competitive conduct of the State's representative was contemplated by the State." *Hoover*, 52 U.S.L.W. at 4538. As will be demonstrated in section II, *infra*, the regulatory schemes under consideration here meet the test for a state action defense.

II. Application of the Midcal Test

A. The State Statutes Establish Pervasive Schemes for the Regulation of Motor Common Carriers.

Petitioner SMCRC contends that the state statutes herein provide clearly articulated and affirmatively expressed state policies to displace competition in the establishment of common carrier rates. The statutes mandate a pervasive scheme in which a public service commission is charged with regulating all aspects of

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[37] The author observes in a footnote that neither the Supreme Court nor the lower courts have required literal compulsion as a prerequisite to a finding of state action, Areeda, 95 Harv.L.Rev. at 438, 439 n.19, and explains that *Goldfarb* and *Cantor* "may be readily explained as decisions resting not on the absence of compulsion, but rather on the absence of any sort of meaningful state participation in the challenged conduct." *Id. See also* Town of Hallie v. City of Eau Claire, 700 F.2d 376, 381-82 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3885 (U.S. June 12, 1984).

motor common carriers.[38] For example, the North Carolina legislature has adopted the following provision:

> For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this Commission and party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges . . . or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement. . . .

Section 62-152.1(b), North Carolina General Statutes, App. A at 2a. Moreover, carriers engaging in such activity are relieved from the operation of North Carolina's state antitrust laws. Section 62-152.1(h), North Carolina General Statutes, App. A at 4a. Notwithstanding the absence of literal compulsion, the North Carolina statute hardly can be said to be anything short of a clear articulation and affirmative expression of state policy to allow collective formulation of intrastate rate proposals by motor common carriers. Indeed, the dissent below so found. Pet. App. at 91a (Hill, J., dissenting).

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[38] *See* Pet. App. 3a-7a. The statutes and regulations for each State are included as Appendices I-V to the Government's Motion to Strike (which Appendices are filed unnumbered in the Record). The current statutes may be found at: § 37-3-1 *et. seq.*, Code of Alabama 1975 (1977); § 46-7-1 *et. seq.*, Official Code of Georgia Ann. (1982); § 77-7-1 *et seq.*, Mississippi Code Ann. (1972); Chapter 62, North Carolina Gen. Stat. (1982); and § 65-15-101 *et seq.*, Tennessee Code Ann. (1982).

Similarly, the Georgia General Assembly has provided for collective rate-making procedures in its statute, which was amended in 1983[39] to provide as follows:

> The commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage, and property and for all services rendered by motor common carriers in connection therewith. The tariffs therefor shall be in such form and shall be filed and published in such manner and on such notice as the commission may prescribe. Such tariffs shall also be subject to change on such notice and in such manner and on such notice as the commission may prescribe. In order to carry out the purposes of this Code section, including the publication and maintenance of just, reasonable, and nondiscriminatory rates and charges, the commission shall establish a collective rate-making procedure for all transportation for which it has heretofore prescribed rates. Failure on the part of any motor common carrier to comply with

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[39] Prior to the 1983 amendment, the Georgia statute provided:

> The commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage, and property and for all services rendered by motor common carriers in connection therewith. The tariffs therefor shall be in such form and shall be filed and published in such manner and on such notice as the commission may prescribe. Such tariffs shall also be subject to change on such notice and in such manner as the commission may prescribe. In order to carry out the purposes of this Code section, including the publication and maintenance of just, reasonable, and nondiscriminatory rates and charges, the commission shall establish rate-making procedures for all motor common carriers, which procedures shall include, but not be limited to, collective rate-making procedures for the joint consideration, initiation, and establishment of such rates and charges. All motor common carriers shall be required to comply with such rate-making procedures.

Section 46-7-18, Official Code of Georgia Ann. (1982). Judge Hill also found that the Georgia statute met the *Midcal* criteria for state action, *Southern Motor Carriers*, Pet. App. at 91a (Hill, J., dissenting).

> this Code section or the rules and regulations promulgated under this Code section may result in suspension or cancellation of said carrier's operating authority by the commission.

Section 46-7-18, Official Code of Georgia Annotated (Supp. 1984), App. A at 4a. Pursuant to this statute, the Georgia Public Service Commission revised its rules relating to collective rate-making procedures to provide, *inter alia*, that each rate bureau must submit for Commission approval, "its procedures for the docketing and handling of proposed prescribed rates." Rule 1-3-1.14, Georgia Public Service Commission, App. A at 6a. The Rule further provides specific requirements for rate bureau procedures.

A pervasive regulatory scheme which contemplates collective rate activity by motor common carriers also is present in the Tennessee statute which was amended in 1983[40] to provide, *inter alia*, for the Tennessee Public Service Commission to determine whether to require uniform rates, joint rate studies, joint presentation of evidence in rate proceedings and joint publication of

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[40] The language relating to collective rate activity in Tennessee, prior to the 1983 amendment, was contained in Section 65-15-106, Tennessee Code Ann. (1982):

> In order to carry out the purposes of this chapter, including the publication and maintenance of just, reasonable and nondiscriminatory rates and charges, the public service commission is vested with the power and authority to establish rate-making procedures for all classes of motor common carriers, including collective rate-making procedures for the joint consideration, initiation and establishment of such rates and charges. Upon petition by a group of motor common carriers the commission shall be empowered to establish collective rate-making procedures, and all carriers party to such agreement shall be required to comply with such rate-making procedures. Nothing in this section shall be construed to prohibit any carrier from exercising its right of independent action in establishing rates and charges.

Once again, Judge Hill would have held this statute sufficient to confer state action immunity. Pet. App. at 91a. (Hill, J., dissenting).

tariffs. Section 65-15-119, Tennessee Code Ann. (Supp. 1983), App. A at 9a. Carriers also may file joint petitions presenting "contentions with respect to the action sought from the commission" but may not propose specific uniform rates, which are set by the commission. Section 65-15-119(g)(3), Tennessee Code Ann., App. A at 10a. Accordingly, the Tennessee legislature has clearly articulated and affirmatively expressed a state policy which specifically contemplates collective rate-related activities by motor common carriers in the context of state regulation.

The Alabama statute governing regulation of motor common carriers by the public service commission also envisions board regulatory powers. The commission "shall" have the duty:

> To supervise and regulate common carriers in all matters affecting the relationship between such common carriers and the traveling and shipping public.

Section 37-3-7(4), Code of Alabama 1975 (1977), App. A at 12a. Since 1942, the Alabama Public Service Commission has ordered common carriers to file an "an individual tariff, or to participate in an agency issue. . . ." (Brief of the State of Alabama and Alabama Public Service Commission *Amicus Curiae* in the District Court, R. 538). This policy was continued in rules adopted by the Commission in 1977. *Id.* at 538-39. Moreover, the members of the Commission, in an affidavit submitted to the district court, stated that:

> We hereby reassert that such collective action is necessary in order to make the Commission's regulation of intrastate motor carriers effective. If every said carrier initiated and filed with the Commission its own rates, charges, etc., in individual tariffs, the result under current budgetary restraints and staffing would be chaotic and disruptive and could result in a complete breakdown in the administration under the Alabama Motor Carrier Act of 1939.

R. 621, 622, ¶ 8. The Alabama Legislature's long-standing mandate that the Commission "shall" regulate all matters relating to motor common carriers, and the Commission's order implementing the legislative directive, again demonstrate a comprehensive regulatory scheme which meets both aspects of the state action test.

Finally, since 1938, the State of Mississippi has provided that:

> It is hereby declared to be the policy of the legislature to regulate motor carriers in the public interest to the end that the safety and welfare of the public in its use of the highways and of the transportation agencies by motor vehicle used thereon may be practiced; that the property of the State in its highways may be protected from unreasonable, improper and excessive use; that the inherent advantages of highway transportation may be recognized and preserved; that sound economic conditions in such transportation and among such carriers may be fostered; that the service by motor carriers may be adequate, economical, and efficient; *that reasonable charges may be made therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; that relations between motor carriers and other carriers may be improved and coordinated;* and that cooperation may be maintained with the governments of the United States and the several States, and with their duly authorized officials in carrying out the purposes and provisions of the Act.

Section 77-7-3, Mississippi Code Ann. (1972) (emphasis added), App. A at 14a. In a brief *amicus curiae* in the district court, the State of Mississippi and the Mississippi Public Service Commission stated that their "general and long established policy" is to "encourage all carriers within a definable class to maintain identical rates . . . for . . . identical service," and "to encourage collective action and rate proposals by the motor carriers themselves." R.

1065-66. This policy is reflected in Rule 39d(4), Mississippi Public Service Commission, App. A at 16a, which requires motor carriers to charge the lowest rate published by any motor carrier for the carriage of the same article or commodity between certain points within Mississippi. As with the other States, Mississippi has expressed grave doubts about its ability to engage in effective regulation absent collective activity. R. 1066.

In summary, each of the five States involved here legislatively contemplates the displacement of competition in the setting of intrastate motor carrier rates as an integral part of comprehensive and pervasive regulation of motor common carriers. The carriers, through organizations such as Petitioner SMCRC, respond to legislative and regulatory commission directives by providing collective rate studies, analysis and, where appropriate, proposed rates, all of which are submitted to the state commissions for decision pursuant to the regulatory processes.

B. The Pervasive Schemes of Regulation Meet the Midcal Test

As demonstrated in section II.A, *supra*, the legislatures of the States involved herein have adopted statutes directing extensive regulation of motor common carriers. Incident to and as a necessary and integral part of these regulatory schemes, the carriers are authorized to engage in collective activity for the purpose of assisting the state regulatory commissions in the performance of their duties. It is the position of Petitioner SMCRC that such activity is undertaken "pursuant to state policy to displace competition with regulation . . . ." *Lafayette*, 435 U.S. at 413. Moreover, the state policy in this case is "clearly articulated and affirmatively expressed" and there is active State supervision. *Midcal*, 445 U.S. at 105.

As to active State supervision, the Eleventh Circuit majority found that "the government and appellants agree that each state actively supervises the collective ratemaking process. . . ." Pet. App. at 73a. In particular, the court found that "the state commissions conduct hearings to review the reasonableness of proposed carrier tariffs and routinely suspend their effectiveness.' *Id.* at n.12. In addition to demonstrating active supervision, such a finding highlights the fact that the "program here was never intended to operate by force of individual agreement or combination." *Parker*, 317 U.S. at 350. Indeed, "it is the state, acting through the Commission, which adopts the program and which enforces it . . . in the execution of a governmental policy." *Id.* at 352. Such a scheme of regulation is hardly a new concept:

> [I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accomodations furnished, and articles sold.

Munn v. *Illinois*, 94 U.S. 113, 125 (1877).

Although Petitioner SMCRC does not contend that every anticompetitive act of a non-sovereign state representative will be protected by state action immunity merely by virtue of there existing a regulatory scheme, *Cantor*, 428 U.S. at 598, nonetheless this Court and other federal courts have recognized that a comprehensive system of state regulation which contemplates displacement of competition will shield the non-sovereign participants therein from the reach of the federal antitrust laws. In *Goldfarb*, where a minimum rate schedule adopted by a county bar association was found not to be within the scope of state action since it was not directed by the State as sovereign, 421 U.S. at 790, the Court went on to

recognize the State's interest in regulation of lawyers and point out that:

> In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.

Id. at 793. Thus, *Goldfarb* was a cause in which the state regulatory scheme simply was not implicated in the challenged conduct.

By comparison, *Cantor* involved approval of private conduct within the framework of the regulatory scheme, but the anticompetitive activity, as later characterized in *Bates*, "was not essential to the State's regulation of electric utilities." *Bates*, 433 U.S. at 361. On the other hand, *Bates* itself involved "regulation of the activities of the bar" which "is at the core of the State's power to protect the public." *Id.*

The extent of the State's true interest in a regulatory program is measured not only by the clear articulation and affirmative expression of a state policy, but also by the extent to which the State supervises the activities undertaken by non-sovereign representatives pursuant to that policy. *Midcal*, 445 U.S. at 105-06. Therefore, the California statute in *Midcal* which clearly stated a legislative policy to displace competition, but which was devoid of active State involvement in or supervision of the program, could not be the basis for a valid state action defense.

The importance of the relationship between the State's regulatory interest and the challenged conduct also has been recognized by the circuit courts. The Ninth Circuit, for example, has noted that this Court "has rejected blanket state action immunity because some state regulation of the relevant business exists." *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 814, 823 (9th Cir.), *cert.*

denied, 456 U.S. 1011 (1982). The court went on to observe that, "[t]he purposes of the regulation must be to avoid the consequences of unrestrained competition in the market for which immunity is sought." *Id.* Similarly, the Third Circuit has stated that state action analysis properly examines, "Pennsylvania's regulatory interest in radio-telephone paging: the nature and quantum of that interest, as well as the extent to which the state has expressed and implemented it." *Mobilfone of Northeastern Pennsylvania, Inc.* v. *Commonwealth Tel. Co.*, 571 F.2d 141, 145 (3d Cir. 1978).[41]

By inquiring into the nature of the regulatory interest and the relationship to the challenged conduct, the courts in fact are attempting to determine whether there is a "clearly articulated and affirmatively expressed" state policy to displace competition. In making this analysis, circuit courts, other than the Eleventh Circuit in the case *sub judice*, have determined that the absence of literal compulsion does not preclude the existence of a clear state policy. *Turf Paradise*, 670 F.2d at 823 n.8; *Gold Cross Ambulance and Transfer and Standby Service* v. *City of Kansas City*, 705 F.2d 1005, 1012 n.11 (8th Cir. 1983); *Town of Hallie* v. *City of Eau Claire*, 700 F.2d 376, 381 (7th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3885 (U.S. June 12, 1984). *See also* P. Areeda, *Antitrust Law*, § 212.5 (Supp. 1982). Indeed, to insist on literal compulsion as a prerequisite for state action immunity weakens the principle of federalism underlying the *Parker* doctrine by limiting a State's ability to regulate as it deems appropriate in its own sovereign judgment. Contrary to

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[41] *See also* First American Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 709 (1984); Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984); *Town of Hallie*, 700 F.2d 376; *Caribe Trailer Systems*, 475 F. Supp. 711, *aff'd per curiam*, No. 79-1658 (D.C. Cir. 1980).

the opinion of the Eleventh Circuit majority,[42] it is entirely reasonable, as part of a comprehensive regulatory scheme, to allow private discretionary initiation of the regulatory mechanism. *Parker* and *New Motor Vehicle Board* allowed no less. Nor was private initiative necessarily fatal in *Cantor*, which turned on the absence of any relationship between the State's regulatory interest and the challenged conduct.

In finding a lack of compulsion herein, the court of appeals purportedly did not rely upon the fact that collective rate proposals are a matter of private initiative. See Pet. App. at 67a n.6. Rather, the court of appeals focused on the allowance of individual filings by carriers. See Pet. App. at 71a-72a n.11. Petitioner agrees that each State herein preserves the right of independent action. It should be noted that such independent actions are few in number, arising when special circumstances exist regarding a particular commodity or route.[43] The record demonstrates that independent actions are the exception and that collective rate proposals are the rule. The States have defended their regulatory programs because these programs could not handle the flood of independent ac-

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[42] Pet. App. at 74a.

[43] For example, Andrew C. Rymer, Director of the Motor Carrier Division of the Tennessee Public Service Commission, stated:

> In actual practice, general changes in motor carrier rates are seldom proposed by individual carriers. When individual carriers do propose rate changes, they usually seek to establish commodity rates to reflect real or fancied savings in operating costs arising from a regular movement or some extraordinary circumstances enabling the carrier to accord to the particular traffic a lower charge than that called for by the class rate structure. On the other hand, any changes made in the class rate structure, or a proposal for a general increase in the level of the class rates generally, usually is the product of a collective proposal by the carriers. As above indicated, in either instance the matter is analyzed and, with a full report, is referred to the commission for disposition.

Affidavit of Andrew C. Rymer, ¶ 11. (JA-79, 83).

tions which the Final Judgment herein would create. It is the existence of this right of independent action which apparently convinced the court of appeals majority that the state action defense did not apply. This conclusion is based on a misreading of the cases.

The existence of some degree of private choice within a state regulatory system does not automatically destroy the state action defense. In *Parker*, the activation of the statutory anti-competitive system was a result of private voluntary acts. 317 U.S. at 346. Moreover, if sufficient growers voluntarily requested the imposition of controls, the state permitted an individual grower under the program "to sell the remaining thirty percent of his standard raisins, denominated 'free tonnage,' through ordinary commercial channels . . ." if he obtained a certificate to do so. *Id.* at 348. Thus, *Parker* itself contains "free choice" elements analagous to the right of independent action herein. By their erroneous imposition of a "compulsion" requirement, the courts below have simply failed to deal with the real issue: whether the States have clearly articulated and affirmatively expressed policies which include the activities challenged by the Government herein. The application of state action immunity, particularly in the regulatory context, demands that both elements of the *Midcal* test be viewed together. Active state supervision such as is present herein responds to the concerns of the Eleventh Circuit majority by ensuring that any private initiative is in keeping with state policy. *Town of Hallie*, 700 F.2d at 384.

The States herein have clearly expressed state policies to displace unfettered competition with systems of regulation through their respective public service commissions. The court of appeals reasoned that absent compulsion, a private party could not carry out state policy "when it is left to the private party to carry out that policy or not as he sees fit." Pet. App. at 74a. This reasoning

amounts to a rejection of what is *in fact* the clear state policy of optional collective or individual filings. The record establishes that the States have consciously chosen systems of regulation under which state agencies oversee and set rates, and regulate numerous other aspects of transportation. The States have included collective rate proposals in their chosen systems of regulation. The basis for these state policies is not some clandestine conspiracy by motor carriers to violate the Sherman Act. Rather, these States have concluded that collective rate proposals are necessary to their ability to regulate motor carriers in the public interest.[44] Indeed, as Judge Hill noted in dissent:

> Initially, it seems clear that a state can articulate clearly a policy which incorporates both the benefits of joint ratemaking and separate filings. Indeed, such a policy of permissive joint ratemaking may be far superior to the complete mandatory joint ratemaking suggested by the majority. As the district court suggested, rate bureaus provide important support services to state regulatory bodies such as the staff experts and facilities necessary to collate data for the preparation of cost studies. *See United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F. Supp. 471, 476 (N.D. Ga. 1979). *See generally* H.R. Rep. No. 1100, 80th Cong., 1st Sess. (1947). However, individual rate submissions also provide an important check on rate bureaus and preserve a certain degree of competition. For example, if an individual rate submission is significantly lower than a bureau rate proposal, the regulatory body is alerted to possible abuse of the privilege of collective ratemaking, and is better able to enforce and supervise its program than if there is no possibility of an individual rate proposal.

Pet. App. at 88a.

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[44] *See, e.g.*, § 62-152-1(b), North Carolina General Statutes, App. A at 2a; § 46-7-18, Official Code of Georgia Ann. (Supp. 1984), App. A at 4a.

As the States strongly contended in the district court, collective rate proposals are a necessary part of state regulation in the public interest.[45] State regulation also involves the uniform system of classifications of freight established by the National Motor Freight Traffic Association based on collective activity by carriers and applied as a part of intrastate as well as interstate rates.[46] The outlawing of collective proposals to change intrastate rates also affects the use of these uniform classifications, which are collectively established. Because of the complexity of the system, "no one carrier could bear the burden involved in classifying, in a just and reasonable manner, over 15,000 separate articles." Without the uniform classifications, "the result would be a tangled mess of conflicting classifications. . . ."[47]

The States have determined their policies and have made those policies known in "clearly articulated and affirmatively expressed" terms. The allowance of some competition is not an expression of lack of policy or neutrality as to collective activity. Rather, it is part of a comprehensive regulatory scheme which deliberately endorses and authorizes collective rate proposals while allowing independent action. Such a scheme is unlike *Boulder*, where this Court found that a home rule statute was at most neutral through silence on the displacement of competition in the cable television market; it is unlike *Cantor*, where the challenged conduct was unrelated to the State's regulatory interest; it is also unlike *United States* v. *Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247, 1253 (9th Cir. 1983), *cert. denied*, 52

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[45] *See, e.g.*, Affidavit of J. C. Turner, ¶ 9, JA-50, 54; Affidavit of I. H. Hinton, ¶ 11, JA-55, 60-61; Affidavit of Andrew C. Rymer, ¶ 12, JA-79, 83; Affidavit of Robert A. Jones, ¶ 9, JA-86, 90-91.

[46] Affidavit of James C. Harkins at 4, 10 (JA-62, 66, 74).

[47] *Id.* at 11-13 (JA-75-78).

U.S.L.W. 3891 (U.S. June 12, 1984), wherein the court found in the statute an express statement of legislative neutrality as to displacement of competition.

In summary, the States involved here have clearly articulated and affirmatively expressed a policy of displacing competition among motor common carriers by replacing it with comprehensive regulatory schemes which contemplate, authorize, supervise and enforce collective rate formulation by the carriers. This is not the "gauzy cloak of state involvement" in a private price-fixing scheme; it is the direct action of the State actively supervising private parties in furtherance of important state regulatory interests. To attempt to separate the private activity from its place in the state regulatory process, as the Government seeks to do here, belies the very basis of federalism upon which the state action doctrine is based.

III. The Applicability of the Noerr-Pennington Doctrine

The pervasive schemes of regulation described in section II, *supra*, require motor common carriers to submit rate proposals to the state regulatory boards for review and action. Accordingly, the collective activities of the common carriers seeking to influence the regulatory bodies in the performance of their statutory duties are within the scope of the *Noerr-Pennington* doctrine and thus are exempt from federal antitrust laws.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), this Court unanimously held that the Sherman Act did not apply to collective action by competing railroads seeking state legislation favorable to railroads and adverse to motor carriers. "[T]he Sherman Act . . . does not apply to . . . [collective] activities compris[ing] mere solicitation of governmental action with respect to the passage and

enforcement of laws." *Id.* at 138. The *Noerr* Court further reasoned:

> We think it equally clear that the Sherman Act does not prohibit two or more persons from *associating together* in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

Id. at 136 (emphasis added). Four years later, in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), the Court held that the protection first announced in *Noerr* extended to efforts to influence the executive branch. This same protection subsequently was extended to efforts to influence administrative proceedings. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

The *Noerr-Pennington* doctrine is grounded in First Amendment concerns, since:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Noerr, 365 U.S. at 139; *California Motor Transport*, 404 U.S. at 510-511. Thus, *Noerr-Pennington* protects both the private citizen's right to seek action by the government and the government's ability to gather information necessary to the decision-making process. Both of these concerns are damaged by the holding of the Eleventh Circuit *sub judice*.

The Eleventh Circuit panel, holding that *Noerr-Pennington* is inapplicable to the collective formulation of

a rate proposal for submission to a state regulatory agency, adopted in part the rationale of the district court:

> The government answers that the complaint charges three distinct types of activity: (1) coordinating and fixing of rates; (2) presenting the collectively set rates to the state commissions; and (3) putting the rates into effect, ostensibly pursuant to state sanction. Implicitly conceding that the second activity is protected, the government contends that the first may be treated separately, and must itself give rise to antitrust liability.

Pet. App. at 43a-44a (quoting *U.S.* v. *Southern Motor Carriers Rate Conference, Inc.*, Pet. App. at 25a). This attempt to separate the activity preparatory to submission of rate proposals to the state commission reduces *Noerr-Pennington* to a meaningless shell. As the district court noted:

> If the defendants may, in the exercise of their right to petition the government, jointly submit rate proposals to the state commissions, it would follow that they must be permitted to confer and to formulate the rates they wish to propose. Just as the speaker must be permitted to prepare his notes and determine what he intends to say, so must the conferences be free to settle on the specific relief or benefits they seek to obtain from the commissions.

Pet. App. at 25a. Nonetheless, both the district court and the circuit court concluded that the collective rate formulation activity had "independent significance" from the petitioning process.

This conclusion ignores the reality of the regulatory process described in section II, *supra*. Indeed, the very existence of the regulatory process means that the collective formulation of a rate proposal can have no independent significance since the motor common carriers cannot impose their own rates outside of the regulatory proc-

ess.[48] Nor is this case one in which the filing of a tariff is a *pro forma* exercise in which the real decision-making power in fact belongs to the private party. *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 700 F.2d 785, 807 (2d Cir. 1983). Unlike the *Litton* case, the filing of a tariff under the motor carrier regulatory schemes is not "a mere *incident* of regulation" in which "[t]he decision to impose and maintain the interface tariff was made in the AT & T boardroom, not at the FCC." *Id.*

As noted by both the district court, Pet. App. at 9a, and by the Eleventh Circuit, Pet. App. at 73a, the submissions of Petitioners are subject to extensive regulatory review. Indeed, it is established on the record that the state regulatory boards rely upon the filings as a significant source of information vital to the regulatory process. See *supra*, n.4. Thus, the case *sub judice* does not present a claim that "the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct." *Cantor*, 428 U.S. at 602. Rather, this case presents an extremely active regulatory process wherein the regulatory boards rely upon the private parties as a valuable source of information. Moreover, in light of the boards'

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[48] Petitioners are in full agreement with the dissenting opinion of Justice Stewart (joined by Justices Powell and Rehnquist) in *Cantor*, 428 U.S. 579, 615 (1976) with respect to the applicability of the *Noerr-Pennington* doctrine in this area of regulatory rate proposal petitioning activity. As Justice Stewart stated:

> [A] utility company thus engages in two distinct activities: It proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under Noerr and the second—compliance with the terms of the tariff under the command of state law—is immune from antitrust liability under Parker and Goldfarb. . .

Id. at 624.

absolute and unquestioned control of the motor common carriers' financial well-being, the right to be able to provide such information to the regulatory boards is of the utmost importance to the carriers.

IV. Conclusion

It is the position of Petitioner SMCRC that the regulatory processes of the States involved herein constitute clearly articulated and affirmatively expressed state policies to displace competition among motor common carriers. Moreover, these policies contemplate and authorize collective activity by motor common carriers to formulate rate proposals for submission to the state regulatory boards. The state regulatory boards actively supervise this activity by routinely ordering hearings and extensive review of the rate proposals and by retaining final authority to approve, modify or disapprove the submissions. Accordingly, the activities of Petitioner SMCRC constitute "state action" which are not subject to the antitrust laws. Additionally, the collective formulation of rate proposals and the submission of those proposals to the state regulatory boards implicate important First Amendment rights which are protected under the *Noerr-Pennington* doctrine. For these reasons, the decision of

the Eleventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

49 U.S.C.A. § 10521(b) (Supp. 1984) provides:

This subtitle does not—(1) except as provided in sections 10922(c)(2), 10935, and 11501(e) of this title, affect the power of a State to regulate intrastate transportation provided by a motor carrier; (2) except as provided in sections 10922(c)(2) and 11501(e), authorize the Commission to prescribe or regulate a rate for intrastate transportation provided by a motor carrier; (3) except as provided in section 10922(c)(2) of this title, allow a motor carrier to provide intrastate transportation on the highways of a State; or (4) except as provided in section 11503(a) and section 11504(b) of this title, affect the taxation power of a State over a motor carrier.

Section 62-130(a), N.C. Gen. Stat. (1982) provides:

(a) The Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction. A rate is made, fixed, established or allowed when it becomes effective pursuant to the provisions of this Chapter.

Section 62-152.1, N.C. Gen. Stat. (1982), provides:

(a) Definitions.—As used in this section, unless the context otherwise requires, the term:

(1) "Carrier" means any common carrier as defined in G.S. 62-3(6).

(2) For purposes of this section, carriers by rail are carriers of the same class, carriers by motor vehicles are carriers of the same class, carriers by pipeline are carriers of the same class, carriers by water are carriers of the same class, carriers by air are carriers of the same class, and freight forwarders are carriers of the same class.

(3) The term "antitrust laws" means the provisions of Chapter 75 of the General Statutes (N.C.G.S. 75-1, et seq.), relating to combinations in restraint of trade.

(b) For the purpose of achieving a stable rate structure it shall be the policy of this State to fix uniform rates for the same or similar services by carriers of the same class. In order to realize and effectuate this policy and regulatory goal any carrier subject to regulation by this Commission and party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by subsection (d) or (e) of this section) if it finds that, by reason of furtherance of the transportation policy and goal declared in this section and in G.S. 62-2 or G.S. 62-259 as may be pertinent, the relief provided in subsection (h) shall apply with respect to the making and carrying out of such agreement; otherwise, the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this subsection.

(c) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under this section shall maintain such accounts, records, files and

memoranda and shall submit to the Commission such information and reports as may be prescribed by the Commission, and all the accounts, records, files and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(d) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that the agreement is of the character described in subsection (b) of this section and is limited to matters relating to transportation under joint rates or over through routes.

(e) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure.

(f) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which approval was granted is not or are not in conformity with the standards set forth in subsection (b) of this section, or whether any such terms and conditions are not necessary for the purposes of conformity with such standards, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standards, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standards or to the extent to which it finds such terms and conditions not necessary to insure

such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardships.

(g) No order shall be entered under this section except after interested parties have been afforded reasonable notice and opportunity for hearing.

(h) Parties to any agreement approved by the Commission under this section and other parties are, if the approval of such agreement is not prohibited by subsection (d) or (e) of this section, hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with the terms and conditions prescribed by the Commission.

(i) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of subsection (h) of this section. (1977, c. 219, s. 1.)

Section 46-7-18, Official Code of Ga. Ann. (Cum. Supp. 1984), provides:

The commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage, and property and for all services rendered by motor common carriers in connection therewith. The tariffs therefor shall be in such form and shall be filed and published in such manner and

on such notice as the commission may prescribe. Such tariffs shall also be subject to change on such notice and in such manner as the commission may prescribe. In order to carry out the purposes of this Code section, including the publication and maintenance of just, reasonable, and nondiscriminatory rates and charges, the commission shall establish a collective rate-making procedure for all transportation for which it has heretofore prescribed rates. Failure on the part of any motor common carrier to comply with this Code section or the rules and regulations promulgated under this Code section may result in suspension or cancellation of said carrier's operating authority by the commission. (Ga. L. 1931, p. 199, § 8; Code 1933, § 68-613; Ga. L. 1980, p. 1119, § 2; Ga. L. 1983, p. 529, § 1.)

APPENDIX TO DOCKET NO. 11414-M

[GA. PUBLIC SERVICE COMMISSION]

REVISION OF RULE 1-3-1-.14 CONTAINING PROCEDURES FOR COLLECTIVE RATE-MAKING

Senate Bill Number 83 of the 1983 Session of the General Assembly of Georgia, enacted into law on March 15, 1983, amended Sections 46-7-18 and 46-7-63 of Chapter 7 of Title 46 of the Official Code of Georgia Annotated so as to change the provisions relating to the authority of the Commission to prescribe reasonable rates, fares and charges for motor common and contract carriers. The amended Code Sections provide, in part, that:

> "In order to carry out the purposes of this Code section, including the publication and maintenance of just, reasonable, and nondiscriminatroy rates and charges, the Commission shall establish a collective rate-making procedure for all transportation for which it has heretofore prescribed rates."

In compliance with the foregoing statutory mandate, the following collective rate-making procedure for all transportation for which the Commission has heretofore prescribed rates is hereby established by revising Rule 1-3-1-.14 to read as follows:

> (A) No person, tariff publishing agent, bureau or association (hereinafter referred to, collectively, as "tariff publishing agent") shall engage in collective rate-making activities unless and until said tariff publishing agent submits in writing to the Commission, for approval, its procedures for the docketing and handling of proposed prescribed rates. Such procedures shall, at a minimum, embrace the following essential elements:
>
> (B) A reasonable and fair method whereby any interested party may propose a change in the rates or rules in a tariff published by a tariff publishing agent

for consideration and vote by the participants to said tariff.

(C) The providing of notice to all participants in and subscribers to a tariff proposed to be changed regarding the proposal; said notice shall also fix a date, time and place for public hearing on the proposal whereby any interested party may appear at such hearing to give evidence or arguments in support of or in opposition to said proposal.

(D) A method whereby notice of rate proposals shall be available to anyone desiring same, including members of the public, upon payment of a reasonable subscription fee, except that such notice shall be mailed to all participants to the tariff without charge.

(E) Carrier participants to a tariff published by a tariff publishing agent may elect a rate committee for each type of carrier group to review proposed changes, to recommend as to the disposition of proposals, and to otherwise direct the affairs of their group, such as for the employment of counsel to handle petitions for rate changes, and for the direction of their tariff publishing agents in connection with docketing, tariff publications and other necessary routine requirements.

(F) Proposals for changes in tariffs, published by an agent for participating carriers as authorized by powers of attorney to the agent, shall be submitted in writing to the agent, or as may otherwise be directed by a governing rate committee. Meetings at which the public docket is to be considered will be called upon not less than ten (10) day's notice to the Committee and to the public.

(G) Each committee member will have one vote and the majority of the votes cast will govern. Proxy voting shall not be allowed.

(H) Formal minutes (not verbatim transcripts) must be kept on all meetings whereat collective ratemaking matters are considered.

A tariff publishing agent shall not, as such, file a protest with the Commission against any proposed tariff change.

The procedures herein authorized may be utilized by motor carriers to develop combined financial data as to operating expenses, revenues and estimated projections related thereto, for analysis and for submission to the Commission as and when required.

Nothing herein shall be construed to authorize the publication of any rate or tariff rule that is unlawful or otherwise prohibited by regulation of the Commission. Except when published to comply with the order of the Commission, all tariffs and amendments thereto will be subject to complaint by an interested party and may be suspended or rejected by the Commission.

GEORGIA, FULTON COUNTY:

I, Horace F. Hartley, Executive Secretary of the Georgia Public Service Commission, do hereby certify that the foregoing document is a true and correct copy of the original thereof, which is on file with the Commission. Given under my hand and official seal of the Georgia Public Service Commission, this 9th day of July 1984.

Horace F. Hartley
HORACE F. HARTLEY
Executive Secretary

Section 65-15-106(a), Tenn. Code Ann. (Supp. 1983), provides:

Powers of public service commission.—(a) The public service commission is vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state, to fix or approve the rates, fares, charges, classifications and rules and regulations pertaining thereto; to regulate and supervise the schedules, service and method of operation of same; to

require the filing of annual and other reports and any other data; to require that the accounts and records of such motor carriers be kept and maintained in a manner consistent with good accounting practice; and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.

Section 65-15-119, Tenn. Code Ann. (Supp. 1983), provides:

Unjust and unreasonable charges prohibited—Uniform rates—Fixing of rates by commission.—(a) All charges made by any motor carrier or contract hauler for any service rendered, or to be rendered in the transportation of persons or property, or both shall be just and reasonable and every unjust and unreasonable charge for such service, or any part thereof is prohibited and declared unlawful, but the minimum rates established by the commission for contract haulers shall not be less than the rates prescribed for common carriers for substantially the same service.

(b) The commission, on its own motion, or on the petition of any one (1) or more motor carriers in a particular category of motor carriers, may institute a rule making proceeding to determine whether to require all motor carriers within a particular category to charge uniform rates under uniform tariff provisions for specific services. On determining that the adoption of such a rule would further the purposes of this chapter, on the basis of consideration of the factors set forth in § 65-5-109, the commission shall adopt such a rule, which shall specify procedures to be followed in its implementation, consistent with the provisions of this chapter and other applicable law.

(c) In fixing rates, whether uniform or not, for any category of carriers, the commission may require all car-

riers in that category to perform joint rate studies with respect to any or all types of service performed by that category of carrriers. Such joint rate studies may be, at the direction of the commission, performed through rate conferences, or bureaus, or associations of such motor carriers. The commission may further direct joint presentation of evidence in any rate making proceeding involving such category of carriers.

(d) The commission may direct the joint publication of tariffs for any category of carriers, either through rate conferences, or bureaus, or associations of such carriers, whether or not the rates, services or tariff rules and regulations for such carriers are uniform.

(e) Any one (1) or more motor carriers may petition the commission to recognize different types of service by such motor carriers.

(f) The commission may authorize carriers in the same category to provide joint or through service by agreement between one or more such carriers and shall establish procedures for fixing rates therefor.

(g) Rates may be fixed by the commission either:

(1) On its own motion;

(2) On petition filed by any motor carrier; or

(3) By the filing of a tariff by a carrier to become effective on a date specified in accordance with commission rules, unless suspended by the commission. Uniform rates for any category of carriers, however, shall be fixed only on the commission's own motion or on petition. Any such petition with respect to uniform rates shall not propose specific rates, but may present contentions with respect to the action sought from the commission. [Acts 1933, ch. 119, § 3; C.Supp. 1950, § 5501.3; T.C.A. (orig. ed.), § 65-1521; Acts 1983, ch. 474, § 2.]

Rule 1220-2-1-.40, Tenn. Public Service Commission, provides:

1220-2-1-.40 ADPTION OF I.C.C. AGREEMENT BETWEEN CARRIERS. The rules and regulations governing the agreements between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities or equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof as set forth by the Interstate Commerce Commission in § 5a of the Interstate Commerce Act, are hereby adopted by the Tennessee Public Service Commission; provided, however, that the final determination on any rates, fares, classifications, divisions, allowances, charges, rules and regulations or procedure shall be left in its final determination to the Tennessee Public Service Commission.

Section 37-3-7, Code of Ala. 1975 (1977), provides:

> It shall be the duty of the commission:
>
> (1) To regulate common carriers by motor vehicle as provided in this chapter, and, to that end, the commission may establish reasonable rules and requirements with respect to adequate service, transportation of passengers, baggage, freight and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees and safety of operation and equipment.
>
> (2) To regulate contract carriers by motor vehicle as provided in this chapter, and, to that end, the commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees and safety of operation and equipment.

(3) To regulate brokers as provided in this chapter, and, to that end, the commission may establish reasonable requirements with respect to the licensing, financial responsibility, accounts, records, reports, operations and practices of any such person or persons.

(4) To supervise and regulate common carriers in all matters affecting the relationship between such common carriers and the traveling and shipping public.

(5) To administer, execute and enforce all provisions of this chapter and to make all necessary orders in connection therewith and to prescribe rules, regulations and procedure for such administration.

(6) To inquire into the organization of motor carriers and brokers and into the management of their business, to keep itself informed as to the manner and method in which the same is conducted and to transmit to the legislature, from time to time, such recommendation as to additional legislation relating to such carriers or brokers as the commission may deem necessary.

(7) To establish from time to time such just and reasonable classification of brokers or of groups of carriers, included in the term "common carrier by motor vehicle" or "contract carrier by motor vehicle," as the special nature of the services performed by such carriers or brokers shall require and such just and reasonable rules, regulations and requirements, consistent with the provision of this chapter, to be observed by the carriers or brokers so classified or grouped as the commission deems necessary or desirable in the public interest.

(8) Upon complaint in writing to the commission by any person, state board, organization or body politic or upon its own initiative without complaint, to investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant

thereto. If the commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the commission shall issue an appropriate order to compel the carrier or broker to comply therewith.

After a decision, order or requirement has been made by the commission in any proceeding under this chapter, any party thereto may make application to the commission for reconsideration or rehearing of the same, or of any matter determined herein, and it shall be lawful for the commission in its discretion to grant such reconsideration or a rehearing, if sufficient reason therefor is made to appear. Such application shall be filed within 30 days after date of such decision, order or requirement; provided, that the commission may by order extend such time for not more than 30 days additional. Applications for reconsideration or rehearing shall be governed by such general rules as the commission many prescribe. No such application shall excuse any motor carrier or broker from complying with or obeying any decision or requirement of the commission or operate in any manner to stay or postpone the enforcement thereof without the special order of the commission. If, after such reconsideration or rehearing, it shall appear that the original decision, order or requirement is in any respect unjust or unreasonable, the commission may reverse, change or modify the same accordingly. Any decision, order or requirement made after such reconsideration or rehearing shall be subject to the same provisions as an original decision, order or requirement; provided, however, it shall not be subject to any further application for reconsideration or rehearing by the commission. (Acts 1939, No. 669, p. 1064, § 5; Code 1940, T. 48, § 301(5).)

Section 37-3-19(g), Code of Ala. 1975 (1977), provides:

(g) In the exercise of its power to prescribe just and reasonable rates for the transportation of passengers or property by common carriers by motor vehicle, the commission shall give due consideration, among other things, to the effect of rates upon the movement of traffic by such carriers to the need, in public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service, and the need of revenues sufficient to enable such carriers, under honest, economical and efficient management to provide such service.

Section 77-7-3, Miss. Code Ann. (1972) provides:

It is hereby declared to be the policy of the legislature to regulate motor carriers in the public interest to the end that the safety and welfare of the public in its use of the highways and of the transportation agencies by motor vehicle used thereon may be practiced; that the property of the state in its highways may be protected from unreasonable, improper and excessive use; that the inherent advantages of highway transportation may be recognized and preserved; that sound economic conditions in such transportation and among such carriers may be fostered; that the service by motor carriers may be adequate, economical, and efficient; that reasonable charges may be made therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; that relations between motor carriers and other carriers may be improved and coordinated; and that cooperation may be maintained with the governments of the United States and the several states, and with their duly authorized officials in carrying out the purposes and provisions of

this chapter. This chapter shall apply to persons and motor vehicles engaged in interstate commerce to the extent permitted by the Constitution and laws of the United States and as provided herein. SOURCES: Codes, 1942, § 7633; Laws, 1938, ch. 142.

Section 77-7-221, Miss. Code Ann. (1972) provides:

In the exercise of its power to prescribe just and reasonable rates for the transportation of passengers or property by common or restricted common carriers by motor vehicle, the commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by such carriers; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such services; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

In any proceeding to determine the justness or reasonableness of any rate, fare, or charge of any such carrier, there shall not be taken into consideration or allowed as evidence or elements of value of the property of such carrier, either good will, earning power, or the certificate under which such carrier is operating. In applying for and receiving a certificate under this chapter, any such carrier shall be deemed to have agreed to the provisions of this paragraph, on its own behalf and on behalf of all transferees or lessees of such certificate. SOURCES: Codes, 1942, §§ 7663, 7664; Laws, 1938, ch. 142.

Rule 39d(4), Miss. Public Service Commission, provides:

> Where two or more freight rates are published to apply on certain articles or commodities between points in Mississippi, by the same motor carriers, or by different motor carriers, the lowest rate, whether class or commodity, shall be applied over all motor carriers accepting and transporting freight between such points; and in no instance should a rate be published or applied which exceeds the aggregate of published intermediate rate, class or commodity, or class and commodity, unless and until proof of the reasonableness of such rate is submitted to and approved by the Commission, provided that in the initial filing penalties will not apply for violation of this rule until such is called to the attention of the carriers and reasonable opportunity is given for adjustment or justification.